No. 732

In The

Supreme Court Of The United States

October Term, 1957

UNITED STATES OF AMERICA, ex rel.
STATE OF WISCONSIN,

Petitioner,

v.

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION,

Respondent,

FEDERAL HOME LOAN BANK BOARD,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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January 17, 1958

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FIRST FEDERAL SAVINGS AND LOAN
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FEDERAL HOME LOAN BANK BOARD,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Attorney General of Wisconsin on behalf of the State of Wisconsin prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above entitled case on October 21, 1957.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 248 Fed. 2d 804.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1957. The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1).

QUESTION INVOLVED

Do the United States District Courts have jurisdiction to inquire by a proceeding in the nature of a quo warranto into an alleged usurpation of corporate rights and privileges under a federal charter issued to a federal savings and loan association?

The District Court initially granted leave to the State of Wisconsin to file the proceeding herein, and thereafter proceeded to consider the matter on its merits. The Court of Appeals passing solely on the question of jurisdiction held that the District Court did not have power to entertain the action at all.

STATUTES INVOLVED

Title 28 U. S. C. A. § 1651 (a) reads:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Title 28 U. S. C. A. § 1345 reads:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

CONSTITUTIONAL PROVISION INVOLVED

Article III, section 2 of the United States Constitution provides in part:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * * to controversies to which the United States shall be a party; * * *"

STATEMENT OF FACTS

1. Nature of the Case.

This is an action in the nature of a quo warranto filed by the appellant State of Wisconsin, with the consent of the district court, to test the right of the appellee First Federal Savings and Loan Association to establish three additional offices away from its main office for the purpose of servicing its loans and contracts and managing its real estate.

The district court held that the association had such power under its federal charter, and decided the case against appellant on the merits. The errors relied on are errors of law only.

2. Organization of Appellee.

The defendant association was organized on February 20, 1934 under the provisions of section 5 of the Home Owners' Loan Act of 1933 as amended, 12 U. S. C. A. § 1464.

This section of the federal statutes authorized the Board now known as the Federal Home Loan Bank Board to promulgate rules and regulations for the chartering under federal law of associations to be known as federal savings and loan associations. The defendant-appellee has its place of business at 730 North Water Street, Milwaukee, Wisconsin and conducted its business at a single office in that city for some 20 years since the time of its organization down to November 1, 1954.

On November 1, 1954, acting under purported authority contained in regulation No. 145.15 of the Federal Home

Loan Bank Board, which relates to the powers of savings and loan associations, the defendant association opened three separate offices or agencies in Milwaukee county, one located at 4433 West Fond du Lac Avenue, Milwaukee, one located at 925 Milwaukee Avenue, South Milwaukee, and one located at 6000 West Oklahoma Avenue, Milwaukee, and such stations have been in operation since such time.

As indicated in the opinion of the trial court, these receiving offices are limited offices or agencies and do not carry on the full gamut of functions which could be carried on by a branch office if established under regulation 145.14, but are limited to receiving payments on mortgage loans and land contracts, and managing any real estate owned by the appellee association.

3. Financial policy of the State of Wisconsin.

Wisconsin, as the result of a policy declaration by the legislature, does not allow its financial institutions, such as savings and loan associations or banks to maintain branch offices of any nature, except as to those banks which had branches before the prohibitive law went into effect in 1947.

Section 215.02 (20), Wis. Stats., reads:

> "(20) ONE OFFICE ONLY. No savings and loan association or building and loan association carrying on business in this state shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state."

4. Procedure Below.

As we have indicated in our statement of the issue involved, the United States District Court for the Eastern District of Wisconsn, the Honorable Robert E. Tehan presiding, initially allowed the state to file its information upon a showing that a demand had been made upon the United States Attorney General to file such an information and that he had refused. Thereafter, the District Court considered the case on the merits and ruled against the relator on the ground that the First Federal Savings and Loan Association had not violated its federal charter.

As we have indicated, the Court of Appeals while affirming the lower court held that the lower court should have dismissed the information for lack of jurisdiction.

We seek certiorari.

REASONS FOR GRANTING WRIT

I. THIS CASE HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH, TO THE EXTENT THAT IT HAS BEEN PASSED UPON, IS PROBABLY IN CONFLICT WITH THE DECISIONS OF THIS COURT

While we respectfully submit that the question involved is a case of first impression since it has never been passed upon by this court, the inference from the cases which we submit with our argument is that the District Court should have jurisdiction to inquire into alleged usurpation of authority under a federal charter.

The decision below is so far-reaching that it would prevent even the United States Attorney General himself from attempting to file an information in the nature of a quo warranto to inquire into an alleged abuse of a federal charter.

For this reason we submit that it is an important question which should finally be resolved by this court.

ARGUMENT

I. Quo warranto is a proper remedy to halt the usurpation of a corporate power or privilege.

A proceeding in quo warrant is an ancient proceeding brought to try the title of persons exercising any corporate rights, privileges, or franchises, or of a person exercising a public office. 15 Cyclopedia of Federal Procedure, page 384, § 85.02:

> "The ancient writ of quo warranto was a high prerogative writ in the nature of a writ of right for the King, against one who usurped or claimed any office, franchise, or liberty of the crown, to inquire by what authority he supported his claim, in order to determine the right."
>
> High, On Extraordinary Legal Remedies 3rd ed. 544.

II. The District Court Has Jurisdiction.

a) Quo warranto actions are permissible in federal district court

Defendant-appellee (hereinafter called First Federal) and Intervenor-Appellee (hereinafter called Government) do not dispute that quo warranto is a proper action in this case, but they insist that the Federal District Court does not have jurisdiction over quo warranto actions.

Title 28 U. S. C. A. § 1651 (a) reads:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The broad phrase "all writs" would seem quite clearly to include the writ of quo warranto. This statute has remained substantially the same since it was originally passed by the First Congress in ch. 20, sec. 14, Laws 1789 (1 Stat. 81), when it read:

> "All the beforementioned courts of the United States [Supreme, Circuit and District] shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

(For subsequent history see R. S. 1878 § 716; Mar. 3, 1911, c. 231 § 262, 36 Stat. 1162; Title 28 USC 1940 ed. § 377; June 25, 1948 c. 646, 62 Stat. 944.)

Note that the only material change that affects quo warranto was the deletion of the words "not specially provided for by statute" from the wording of the present statute passed in 1948. The significance of this deletion, if for any purpose other than the elimination of an unnecessary phrase, would appear to be that the statute is even broader after the elimination of one of the qualifications; that "all writs not specially provided for" may be issued. Now, presumably, all writs whether specially provided for or not may be issued, subject still of course to the remaining qualifications that they be "necessary or appropriate in aid of their respective jurisdictions, and agreeable to the usages and principles of law."

The language in federal court opinions on the subject indicates that quo warranto is a type of remedy that can be obtained in federal court if the case is proper in other ways. The following cases have held that quo warranto actions are permissible in federal courts either originally or as removal cases from state courts.

Ames v. Kansas, (1884) 111 U. S. 449;

Klein v. Wilson & Co. Inc., (D. C. N. J. 1925) 7 Fed. 2d 772;

Gunton v. Ingle, (1834) Fed. case No. 5870;

State of Illinois v. Illinois Central R. Co., (1888) 33 Fed. 721.

In cases denying federal jurisdiction over certain quo warranto proceedings, the courts have done so not because relief in a quo warranto action was beyond their powers, but because some other requirement was not satisfied. In *Territory v. Lockwood,* (1865) 3 Wall. 236 and *Wallace*

v. Anderson, (1820) 5 Wheat. 291, the court dismissed the actions because they were not brought in the name of the federal government. However, the court clearly implied that the action could have been brought by the government. In a similar case, *Johnson v. Manhattan Ry. Co.*, (1933) 289 U. S. 479, the court said at p. 502:

> "* * * It [quo warranto] is an extraordinary proceeding, prerogative in nature, and in this instance could have been brought by the United States * * *."

Also in *North Arlington Nat. Bank v. Kearny Federal Savings & Loan Assn.*, (1950) 92 Fed. Supp. 481, 482, the court in holding that a competitor cannot sue to attack the validity of a savings and loan association branch office said: "Such action is reserved to the government in an action analogous to a quo warranto proceeding."

These cases, while refusing to allow quo warranto actions on other grounds, clearly stand for the proposition that a quo warranto proceeding is *possible* in federal court. Common sense fortifies this conclusion, for if quo warranto were not allowed in federal court our federal government would have no power to prevent corporations, existing under a federal grant or charter, from exceeding the powers granted them.

Further evidence of the fact that Congress intended that quo warranto actions could be brought in federal court is the specific mention of quo warranto actions in Title 28 U. S. C. A., Federal Rules of Civil Procedure, Rule 81 (a) (2):

> "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise

> than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, *quo warranto*, and forfeiture of property for violation of a statute of the United States. * * *" (Emphasis supplied.)

Congress would hardly provide for the procedure to be used in quo warranto actions if federal courts were not intended to have jurisdiction over them.

Appellees cite only *Morin v. City of Stuart*, (C. A. 5) 111 Fed. 2d 773, 775-776 in support of their contention that federal district courts "have not the right to exercise the quo warranto jurisdiction." The *Morin* case was a suit for an injunction by a landowner to restrain a Florida city from levying, assessing and attempting to collect taxes on lands on the ground that such lands were not legally part of the city. The court held that this suit constituted a "collateral attack upon the corporate existence of the defendant, and that not injunction but quo warranto in the state court, is the appropriate, indeed the exclusive remedy." The statement quoted in the government's brief occurs in the following context:

> "However clear this matter now may be to the courts of Florida which have the right to exercise both injunctive and quo warranto jurisdiction, it is certainly not clear to the federal courts, *which have not the right to exercise the quo warranto jurisdiction*, and unless it is absolutely plain, under the state court decisions that there is injunctive jurisdiction in a matter of this kind, it is the duty of the federal court to decline jurisdiction and to remit the matter to the state courts."

Thus the chief basis for the court's decision was the fact that the plaintiff had chosen the wrong remedy, injunction instead of quo warranto. Moreover, the court felt that the quo warranto jurisdiction to try the corporate authority of a municipality was within the exclusive province of the sovereign granting the charter, the State of Florida. The case certainly is not authority for declaring that federal district courts have no quo warranto jurisdiction.

The government advances the further argument that quo warranto is not permissible in any federal district other than the District of Columbia, because such jurisdiction is conferred specially only in the District of Columbia Code. It is understandable why the District of Columbia has its own special Code. It presents a unique and special governmental situation, not being one of the 48 states, but being under direct federal control. Many laws pertaining to this district are special for this reason.

As a matter of fact, even the District of Columbia federal court allowed quo warranto actions *before* the District of Columbia Code was passed in 1901. The case of *Gunton v. Ingle, supra,* (1834), was decided prior to the passage of the Code, when only the general jurisdictional provisions and the "all writs" statute applied to the District of Columbia court. This case held that a quo warranto action could be brought in federal court. Subsequent to the enactment of the District of Columbia Code, the District of Columbia court has recognized that the provision relating to quo warranto proceedings "obviously leaves the former common law principles governing the issuance of quo warranto in full force." *U. S. ex rel. Noel v. Carmody,* (1945) 80 App. D. C. 58, 148 Fed. 2d 684.

Since all federal courts had power to entertain proper quo warranto actions *before* the D. C. Code, it seems only logical that the passage of this statute, under the special circumstances present in the District of Columbia, did not remove from all other district courts this power derived from the "all writs" statute, in effect continuously since 1789.

One other special statute is relied upon by the government in its argument that quo warranto actions are not allowable. The government cites Rev. Stat. §§ 563 (14), 629 (14). This statute passed on May 31, 1870 (ch. 114, sec. 23, 16 Stat. 146) gave district courts (§ 563) jurisdiction over: "all proceedings by writ of quo warranto, prosecuted by any district attorney, for the removal from office of any person holding office * * *" (except members of Congress and state legislatures) contrary to Art. XIV, sec. 3, of the Constitution.

Since the traditional use of quo warranto proceedings was to allow a sovereign to halt usurpation of those offices or franchises existing by virtue of that sovereign, it is apparent that this statute departs from that traditional use of quo warranto. This statute was designed to allow federal courts to try post-civil war insurrection cases involving officers of states and municipalities whose offices derived from a different sovereign, a State. It was undoubtedly felt that some state sovereigns were unable to provide an adequate and just forum in which to challenge the conduct of their state and municipal officers.

At the time of the judicial revision of 1911, the statute was repealed, probably because the need for this extension of quo warranto jurisdiction over offices of another sover-

eign (the States) had now subsided. This special use of quo warranto in no way affects the power of federal courts to hear quo warranto cases, involving federal offices and corporations, authorized by the "all writs" statute and Title 28 U. S. C. A. § 1345.

R. S. § 563 (14) was located in the chapter that contained a list of the cases over which jurisdiction was granted to district courts; the chapter was entitled "Jurisdiction of District Courts." Unlike this statute the "all writs" statute was placed in the Rev. Stat. of 1878 and in the revision of 1911 (36 Stat. 1162) in a chapter entitled "Provisions Common to More than One Court." The present "all writs" section is listed under "Procedure—General Provisions" in Title 28 U. S. C. A. § 1651.

We point to the location of these statutes to illustrate that R. S. §§ 563 (14) and 629 (14) were statutes conferring special subject matter jurisdiction upon the federal district and circuit courts, while the "all writs" statute has always been a procedural statute authorizing certain types of actions (including quo warranto) where the court otherwise has jurisdiction by virtue of the jurisdictional statute.

b) This is a suit instituted by the United States

The government argues that even if the "all writs" statute does include quo waarrnto actions (and we have shown that it does) nevertheless this statute does not confer additional judisdictional authority. We agree with this contention to the extent that jurisdiction over the dispute must be found somewhere in the jurisdiction statute.

It is our contention that the "all writs" statute allows quo warranto proceedings if the federal court has jurisdiction over the case. We have illustrated that quo warranto actions are permissible and will now deal with the jurisdiction of the court over the dispute.

Title 28 U. S. C. A. § 1345 reads:

> "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

If the United States through the U. S. Attorney General were initiating this action (assuming that quo warranto is a permissible action under the "all writs" section), the conclusion that the court has jurisdiction by virtue of § 1345 is inescapable; the statute covers the case precisely.

However, the government contends that this is a suit by Wisconsin, and not actually by the United States. This contention may stem from a misunderstanding of the nature of a quo warranto. In a proceeding for quo warranto, the gravamen of the action is the injury to the sovereign arising out of the abuse or usurpation of a franchise granted by the sovereign, and the sovereign whose franchise is being abused is the real party in interest in the action. The relator, whether he be the sovereign's appointed Attorney General or some other person who calls the injury to the attention of the sovereign's justices (who are also its representatives and in early days of the common law in fact functioned practically as deputy kings) is only the informant, need not necessarily derive any personal benefit from

the institution of the action, and is not the real party in interest.

The Wisconsin supreme court aptly described the interest of the sovereign and the nature of a quo warranto action in *Income Tax Cases*, (1912) 148 Wis. 500, as follows:

> "This transcendent jurisdiction is a jurisdiction reserved for the use of the state itself when it appears necessary to vindicate or protect its prerogatives or franchises or the liberties of the people, the state uses it to punish or prevent wrongs to itself or the whole people; *the state is always the plaintiff*, whether the action be brought by the Attorney General, or, against his consent, on the relation of a private individual under the permission and direction of the court. It is never the private relator's suit, he is a mere incident; he brings the public injury to the attention of the court, and the court, by virtue of the power granted by the constitution, commands that the suit be brought by and for the state." (Emphasis supplied.)

c) The District Court has power to authorize, in the exercise of its discretion, a private relator to institute a quo warranto proceeding in the name and interest of the U. S. when the law officer of the sovereign has refused to act.

The proposed information filed with the petition for leave in this matter shows that under date of October 29, 1954, a formal demand was made upon the United States Attorney General, Hon. Herbert Brownell, to institute this action to determine whether or not the defendant association was exceeding the franchise granted to it by the United States, and that on November 5, 1954, the Attorney General formally declined to institute or participate in such action.

In High, On Extraordinary Remedies, pp. 554-555, it is stated:

"§ 602. Before the statute of Anne, the information in the nature of a quo warranto was employed exclusively as a prerogative remedy, to punish a usurpation upon the franchises or liberties granted by the crown, and it was never used as a remedy for private citizens desiring to test the title of persons claiming to exercise a public franchise. And although such informations were exhibited by the king's attorney-general long before this statute, yet the remedy thereby given was never enlarged beyond the limits prescribed for the original writ of quo warranto, which extended only to encroachments upon the royal prerogative. Hence the information, as a means of investigating and determining civil rights between parties, may be said to owe its origin to the statute of Anne, which authorized the filing of the information, by leave of court, upon the relation of any person desirous of prosecuting the same, for usurping or intruding into any municipal office or franchise in the kingdom. * * *

"§ 603. The original writ of quo warranto was strictly a civil remedy, prosecuted at the suit of the king by his attorney-general, and in case of judgment for the king the franchise was either seized into his hands, if of such a nature as to subsist in the crown, or a mere judgment of ouster was rendered to eject the usurper. * * *"

At page 558 of High, On Extraordinary Remedies, it is stated:

"* * * And the principle is now firmly established, that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the court to which the application is made,

> even though there is a substantial defect in the title by which the office or franchise is held. * * * The court will also weigh the considerations of public convenience involved, and will compare them with the injury complained of, in determining whether to grant or refuse the application. * * *"

The government contends that Wisconsin cannot sue in the name of the United States; that only the United States Attorney General is authorized to do this. The cases they cite to his effect do not involve quo warranto actions and do not deal with the nature of this unique proceeding.

When the power was conferred upon the district courts by the 1789 "all writs" act to proceed in an action in quo warranto, the courts took that writ as it existed at common law at the time of the adoption of the Constitution together with the practice then established for some 700 years in the English courts. They took it with the power to determine themselves on behalf of the sovereign whether there had been an injury to the sovereign which should be subjected to judicial scrutiny.

There is nothing novel in the principle that the court itself may be the representative of the sovereign for the purpose of determining whether one of the prerogative writs such as quo warranto may be allowed. At common law it is at least as old as the Statute of Anne, 1710. A district court in *Gunton v. Ingle,* (C. C. D. C. 1834) Fed. case 5870, said:

> "I am satisfied that an information may be sustained at the relation of a private person against a person usurping an office under a private corporation; that is in the discretion of the court to allow or to refuse to allow such an information to be filed. It must

> be a case in which the public is concerned or in which the authority of the United States is contemned [sic.] or abused."

This case arose in the District of Columbia before the special provision for quo warranto in the D. C. Code.

In *U. S. ex rel. Crawford v. Addison,* (1867) 6 Wall. 291, the court said:

> "Crawford then proceeded by quo warranto in Federal Court of the District to test Addison's right to the place; the proceeding being in the *usual form of one by the United States at the relation of the party aggrieved.*" (Emphasis supplied.)

See the Wisconsin cases of *State ex rel. Atty. Gen. v. Cunningham,* (1892) 81 Wis. 440 and *State ex rel. Lamb v. Cunningham,* (1892) 83 Wis. 90, for further judicial description of the nature of the remedy of quo warranto. The court said in the latter case at page 134: "We must hold that refusal of the Attorney General to bring or consent to bring this suit did not prevent this court from righfully taking jurisdiction of the same upon the relation of a private citizen."

In the present case the United States Attorney General, as we anticipated he would, felt duty bound to defend the position of the Home Loan Bank Board, one of his statutory clients. That is both his right and privilege, but when he has made that decision let him defend upon the merits and not attempt to foreclose a judicial inquiry into the soundness of his position.

We recognize that only the United States can bring a quo warranto to examine into a federal charter, that such

action must be authorized by some branch of the United States government, that if the U. S. Attorney General refuses to bring the action authorization is discretionary with the court to which a petition is addressed. The District Court, in the exercise of that discretion, decided that there were sufficient public considerations involved and authorized Wisconsin to sue in the name and interest of the United States.

CONCLUSION

We respectfully submit that the judgment of the Court of Appeals should be reversed and the right of the United States as sovereign to inquire into an abuse of a corporate charter granted by the United States by a proceeding in the nature of a quo warranto should be declared.

Respectfully submitted,

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EXHIBIT A

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 12031 SEPTEMBER TERM AND SESSION, 1957

UNITED STATES OF AMERICA EX REL. STATE OF WISCONSIN,
Plaintiff-Appellant,
v.
FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION AND FEDERAL HOME LOAN BANK BOARD,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

October 21, 1957

Before DUFFY, *Chief Judge*, SCHNACKENBERG AND HASTINGS, *Circuit Judges*.

HASTINGS, *Circuit Judge*. This is an appeal by the state of Wisconsin from an order dismissing an action in the nature of a *quo warranto* filed by it in the name of the United States, with the consent of the district court, against appellee, First Federal Savings and Loan Association of Milwaukee, Wisconsin.

First Federal is a savings and loan association which operated from 1934 to 1954 at a single office in Milwaukee under a charter granted by the Federal Home Loan Bank Board pursuant to the Home Owners' Loan Act of 1933,

12 U. S. C. A. 1461 et seq., and the Board's Regulations under that Act, 24 C. F. R. 141.13-141.15, inclusive.

In 1954, under authority of the Board's Regulation No. 145.15, First Federal established three limited agency offices in Milwaukee for servicing its mortgage loans and contracts and managing its real estate. These limited agencies did not accept applications for or negotiate loans and rendered no service in connection with savings accounts, these matters being handled exclusively at the main office.

In 1947, Wisconsin adopted a statute which prohibits its state financial institutions from operating agencies. Section 215.02(20) of the Wisconsin statute reads:

> "(20) ONE OFFICE ONLY. No savings and loan association or building and loan association carrying on business in this state shall operate or maintain any branch offices, paying or receiving stations, agencies or branch associations within this state."

On October 29, 1954, Wisconsin made a formal demand upon the United States Attorney General to institute this action to determine whether or not First Federal was exceeding its charter and operating contrary to the policy of the state. The Attorney General formally replied (citing decisions of the courts supporting the action of First Federal) and refused to have such action instituted in the name of the Attorney General, *"even assuming that quo warranto would be the appropriate type of proceeding in such a situation."* (our emphasis).

Following this refusal, the Attorney General of Wisconsin filed a petition in the United States District Court for the Eastern District of Wisconsin in the name of "United States of America *ex rel.* State of Wisconsin, Plaintiff", asking leave to file an information in the nature of a *quo warranto* to test the right of First Federal to establish the three limited agency offices. After a proper hearing, such

leave was granted and the information was filed. Since the proceeding directly challenged the validity of the Regulation under which First Federal established the agencies, 24 C. F. R. 145.15, the Federal Home Loan Bank Board intervened in the action. The facts were stipulated, including the depositions of two witnesses describing the operations carried on at the agencies in question.

Under these facts, Wisconsin moved for summary judgment, having asserted in its information that the Regulation (24 C. F. R. 145.15) "is null and void in that it is beyond the powers delegated to the Home Loan Bank Board by Congress", "is an invalid subdelegation of the powers of the board itself, and hence is not a part of the charter issued to defendant by the United States", and that "the establishment of branch or receiving agencies of savings and loan associations in thhe state of Wisconsin is prohibited by sec. 215.02(20) of the Statutes of the State of Wisconsin." First Federal and the Board then moved to dismiss the action on the grounds that the court lacked jurisdiction to entertain such an action in *quo warranto*, that the state of Wisconsin had no authority to use the name of the United States in maintaining such an action, that the state of Wisconsin had not exhausted administrative remedies, and that no claim had been stated upon which relief could have been granted.

The district court assumed, without deciding, that it had jurisdiction to entertain the instant action and, on the merits, found that First Federal had acted lawfully in pursuance of a valid regulation. Accordingly, the court granted the motions for dismissal and denied the motion for summary judgment.

The contested issues are whether the district court has jurisdiction over a *quo warranto* action filed by the state of Wisconsin in the name of the United States to challenge the assertion of corporate authority by a federally chartered corporation after the United States Attorney General

had formally declined to file such an information, and whether the Regulation of the Federal Home Loan Bank Board, which authorizes federal savings and loan associations to establish limited agencies, is valid.

We find ourselves in accord with the district court's well considered opinion on the merits of this case, but the issue of jurisdiction rises to meet us first. As will appear later, we cannot give further consideration to affirmance of the judgment below on the merits if our determination of jurisdiction is adverse to the relator. The question of jurisdiction is basic and fundamental and cannot be ignored. It has been raised by appellees throughout this proceeding. Since we believe its determination is of paramount necessity here we shall give it first considration.

The district court said, on the issue of jurisdiction:

> "* * * being of the opinion that the relator * * * had made a showing that a substantial issue existed, ordered that it be granted leave to file its information in the nature of *quo warranto* * * *."
>
> "The assertion of the right of the State of Wisconsin or any person to bring an action in the nature of *quo warranto* without the consent of the Attorney General of the United States, *raises a substantial question*. This court is inclined, however, to the opinion that if the defendant Association in asserting the right to maintain agencies is asserting and usurping a prerogative and franchise not conferred upon it by its charter and is invading the sovereign prerogatives of the United States by whom the charter was granted, the sovereign State of Wisconsin has standing to employ the extraordinary writ of *quo warranto* to test the legality of the Association so to act. We are of the further mind that the State of Wisconsin is not required to seek its remedy by use of the administrative procedure under the Act nor is it required to use less

extraordinary remedies before resorting to *quo warranto. We assume these procedural points,* however, *and do not decide them,* since our decision does not turn upon them." (our emphasis).

The modern information in the nature of a *quo warranto* is an extraordinary remedy and has been defined "as an information, criminal in form, presented to a court of competent jurisdiction, by the public prosecutor, for the purpose of correcting the usurpation, mis-user, or non-user, of a public office or corporate franchise * * * and while still retaining its criminal form, it has long since come to be regarded as, in substance, a civil proceeding, instituted by the public prosecutor, upon the relation of private citizens, for the determination of purely civil rights." High, Extraordinary Legal Remedies, 2d Ed., p. 458. The origin of the original writ itself is to be found in the earliest history of the common law. The employment of the original writ, its subsequent limitation by statute, its lapse into disuse in England, the usurpation of its place by the modern remedy of an information and the recognition of the remedy by constitutional and statutory provisions in the various jurisdictions are all the subject of an interesting historical development to be found in Chapter XIII of High's treatise on this subject. It is further pointed out that jurisdiction in this country is generally fixed by the constitutions and statutes of the several states. "Since the remedy by *quo warranto,* or information in the nature thereof, *is only employed to test the actual right to an office or franchise, it follows that it can afford no relief for official misconduct and can not be employed to test the legality of the official action of public or corporate officers.*" (our emphasis). High, *supra,* p. 485.

An examination of several of the statutes authorizing the use of this extraordinary remedy reveals that its application is rather broad but specifically limited to the use therein provided. There have been submitted to this court

only two instances in which original *quo warranto* jurisdiction has been specifically conferred upon federal district courts. The revised statutes of 1878 vested jurisdiction in these courts of proceedings brought by the United States Attorney for the removal of persons holding office contrary to the Fourteenth Amendment. Rev. Stat., Sections 563(14), 626(14), (1786). This Act was repealed in the Judicial Code of 1911, 36 Stat. 1168. In 1901, Congress specifically authorized the United States District Court for the District of Columbia to issue *quo warranto* in the name of the United States. Act of March 3, 1901, 31 Stat. 1419, Title 16, Section 1601 of the D. C. Code (1940). However, this grant is strictly limited and is confined solely to situations involving franchises and public offices held within the District of Columbia. There is no other specific statutory provision vesting original jurisdiction in the district courts in *quo warranto* actions. In construing this statute, the Court of Appeals for the District of Columbia held that it did not apply where the plaintiff sought relief from alleged misconduct of a corporation and that *quo warranto* was not an appropriate remedy for attempted revocation of the corporate charter of a bar association on the ground of alleged abuse and misuse of its charter. *United States ex rel. Robinson* v. *Bar Association of District of Columbia*, D. C. Cir., 197 F. 2d 408 (1952).

The general jurisdiction of federal district courts is limited and defined strictly by statute. We cannot look beyond Congressional enactments to determine the extent or scope of this jurisdiction. In the absence of specific statutory provision, Wisconsin relies on two sections of Title 28 U. S. C. A., 1345 and 1651(a). Section 1345 provides:

> "Except as otherwise provided by Act of Congress the district courts have original jurisdiction of all civil actions, suits or proceedings commenced by the United States or by any agency or officer thereof expressly authorized to sue by Act of Congress."

This suit is not one commenced by the United States or any of its officers or agencies. In fact, the United States Attorney General expressly refused to institute this action. It is admittedly filed by the state of Wisconsin. While technically it is filed in the name of the United States ex rel. State of Wisconsin, it is in effect a suit by the state of Wisconsin, and not a suit by the United States.

Section 1651(a), *supra*, provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This provision does not enlarge or expand the jurisdiction of the courts but merely confers ancillary jurisdiction where jurisdiction is otherwise granted and already lodged in the court. *Covington and Cincinnati Bridge Co.* v. *Hagar*, 203 U. S. 109, 111 (1906), and *Knapp* v. *Lake Shore and Michigan Southern Ry. Co.*, 197 U. S. 536 (1905). The statute presupposes existing complete jurisdiction and does not contain a new grant of judicial power. In passing upon the meaning and purpose of this section this court has said:

> "[w]hile the section augments the power of the court in cases of existing jurisdiction it in no wise expands or extends its territorial jurisdiction." *Edgerly* v. *Kennelly*, 7 Cir., 215 F. 2d 420, 422 (1954).

There are few authorities touching upon the jurisdiction of a district court to entertain an information in the nature of *quo warranto*. "No instance is known of the use of writ of *quo warranto* in a district court of the United States other than the District Court of the District of Columbia." Cyc. of Federal Procedure, 2d Ed., Sec. 7098. The court, in *United States* v. *Malmin*, 3 Cir., 272 Fed. 785, 790 (1921) indicated that *quo warranto* is the proper remedy to try the title of a judge of a court of the United States but

did not indicate in what court it could be entertained. In a suit to enjoin defendant city from levying taxes the court noted that the state law provided the exclusive remedy in an action for *quo warranto* and stated, "* * * *the federal courts, * * * have not the right to exercise the quo warranto jurisdiction* * * *." (our emphasis). *Morin* v. *City of Stuart*, 5 Cir., 111 F. 2d 773, 775 (1940). Doubt was expressed that federal courts have *quo warranto* jurisdiction, except as specifically authorized by statute in *Cleveland Cliffs Iron Co.* v. *Village of Kinney*, 262 Fed. 980, 984 (1919) and *In Re Yancey*, 28 Fed. 445, 451 (1886).

A parallel may be drawn between *quo warranto* and mandamus on this question of jurisdiction of the federal district courts. It has been repeatedly held that mandamus may not issue in the district court unless it is necessary for the exercise of independently conferred jurisdiction. In the case of *Marshall* v. *Crotty*, 1 Cir., 185 F. 2d 622, 626, 627 (1950), the leading cases are cited to this effect. The court goes on to point out that in Title 28 U. S. C. A., 1331, the phrase "all civil actions" does not enlarge the jurisdiction of the district courts to vest in them general original jurisdiction in cases of mandamus.

We hold, except as otherwise specifically provided by statute, that there is no original jurisdiction in the federal district court to entertain an information in the nature of *quo warranto*. This makes it unnecessary for us to pass upon the other questions raised in this appeal. It follows that the district court in this case should have dismissed the action for want of jurisdiction instead of determining it upon the merits. The judgment dismissing the action is therefore modified so as to show that the case was dis-

missed for want of jurisdiction, and, as thus modified the judgment is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.